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In the Supreme Court of the United States

OCTOBER TERM, 1982

CAMPBELL INDUSTRIES, INC., ET AL., PETITIONERS
v.
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether Section 8(f) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 908(f), limits an employer's liability for compensation to 104 weeks where the injured employee did not have a pre-existing disability manifest to the employer prior to the disabling injury.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1d-15d) is reported at 678 F.2d 836. The decision of the Benefits Review Board (Pet. App. 1c-10c) is reported at 13 Ben. Rev. Bd. Serv. (MB) 227. The decision and the amended decision of the administrative law judge (Pet. App. 1a-3la, 1b-3b) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1982. A petition for rehearing was denied on July 2, 1982 (Pet. App. 1e). The petition for a writ of certiorari was filed on September 30, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Hugo Lostaunau, a waysman (general laborer) employed by petitioner Campbell Industries, sustained four minor injuries on the job in 1971 and 1972. In each instance, he returned to his normal work within days and without any residual medical problems (Pet. App. 5a-6a, 2c, 2d). On September 16, 1973, Lostaunau twisted his lower back while shoveling sand for a sandblaster pot utilized in ship repair. He also developed psychiatric problems after this injury, culminating in physical assaults on his wife, threats to his children, and a suicide attempt in 1979 (*id.* at 11a-13a, 3c, 2d-3d). Although Lostaunau made several attempts to resume his duties, he has not worked since 1973 (*id.* at 9a, 3c, 2d).

2. Following the 1973 injury, Lostaunau applied for compensation pursuant to the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. (& Supp. IV) 901 *et seq.* After hearing extensive conflicting medical evidence with respect to both the orthopedic and psychiatric problems, the administrative law judge concluded that Lostaunau was permanently and totally disabled at the time of the hearing and therefore entitled to compensation (Pet. App. 23a). The administrative law judge also found that petitioners were not entitled to have their liability limited to 104 weeks of compensation pursuant to Section 8(f) of the LHWCA, 33 U.S.C. 908(f) (Pet. App. 23a-25a).[1] Petitioners failed to qualify for this statutory limitation on liability because Lostaunau did not have

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[1]Section 8(f)(1), 33 U.S.C. 908(f)(1), provides in pertinent part:

> In any case in which an employee having an existing permanent partial disability suffers injury, the employer shall provide compensation for such disability as is found to be attributable to that injury * * *. In all other cases of total permanent disability or of death, found not to be due solely to that injury, of an employee having an existing permanent partial disability, the employer shall provide in addition to compensation under paragraphs (b) and

an existing permanent partial disability before the 1973 injury; in reaching this conclusion, the administrative law judge found that Lostaunau was not "economically disabled." Furthermore, the administrative law judge found that the 1973 injury was the sole cause of Lostaunau's disability, and if he had a pre-existing partial disability arising from a personality disorder or disc disease, it was not manifest to his employer (*id.* at 24a-25a).

Petitioners appealed the administrative law judge's ruling to the Benefits Review Board.[2] The Board reversed with respect to Section 8(f), holding that the administrative law judge erroneously equated "permanent partial disability" with economic disability (Pet. App. 6c). After independently evaluating the evidence, the Board found that Lostaunau had an "existing permanent partial disability" prior to the 1973 accident, that this condition was manifest to the employer, and that Lostaunau's current disability was, in part, attributable to his prior medical problem (*id.* at 6c-8c).

3. The court of appeals reversed the Board and reinstated the administrative law judge's decision. In so doing, the court of appeals acknowledged that the administrative

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(e) of this section, compensation payments or death benefits for one hundred and four weeks only. * * *

In all other cases in which the employee has a permanent partial disability, found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone, the employer shall provide in addition to compensation under paragraph (b) and (e) of this section, compensation for one hundred and four weeks only.

After 104 weeks, the compensation due the employee or the survivor is paid out of a special fund established by Section 44 of the LHWCA, 33 U.S.C. 944, commonly called the second injury fund. 33 U.S.C. 908(f)(2).

[2]The Director of the Department of Labor's Office of Workers' Compensation Programs appeared as a respondent before the Board.

law judge had erroneously equated permanent partial disability with economic disability. The court held, however, that the administrative law judge's findings of fact precluded a finding of a pre-existing permanent partial disability even under the liberal standard used by the Board. See *C & P Telephone Co.* v. *Director, OWCP*, 564 F.2d 503 (D.C. Cir. 1977). As stated in *C & P Telephone* (564 F.2d at 513), that standard provides that a pre-existing disability is present if "the employee had such a serious physical disability in fact that a cautious employer would have been motivated to discharge the handicapped employee because of a greatly increased risk of employment-related accident and compensation liability." See Pet. App. 6c-7c, 9d-11d.

Finally, the court of appeals concluded that the Board had exceeded its authority by substituting its own factual findings for those reached by the administrative law judge (Pet. App. 3d-6d, 7d-11d, 13d-15d). In particular, the court noted that whether a pre-existing disability was manifest to the employer was a factual question (*id.* at 7d-8d) and that the evidence supported the administrative law judge's finding that neither the degenerative disc disease nor the psychological problems were manifest before the 1973 injury (*id.* at 24a-25a, 13d-14d).

ARGUMENT

The decision of the court of appeals does not conflict with any decision of this Court or any other court of appeals. In fact, the court's interpretation of the circumstances under which an employer is entitled to the Section 8(f) limitation on liability falls squarely within the accepted legal standard. Accordingly, further review by this Court is unwarranted.

1. Petitioners' principal contention (Pet. 18-21) appears to be that the court of appeals' decision conflicts with the decision of this Court in *Lawson* v. *Suwannee Fruit & Steamship Co.*, 336 U.S. 198 (1949), and with decisions of

other courts of appeals refusing to limit pre-existing disabilities to conditions affecting earning capacity.[3] The major premise of petitioners' argument — that the court below applied an economic disability standard — is erroneous. The court below expressly rejected an economic disability standard, and applied instead a broader standard more favorable to petitioners (Pet. App. 9d-10d).[4]

The standard the court of appeals applied is correct and is fully in accord with the purposes of Section 8(f). In *Lawson* v. *Suwannee Fruit & Steamship Co., supra,* 336 U.S. at 201, this Court reviewed the congressional intent behind the second-injury relief provision and identified "the prevention of employer discrimination against handicapped workers" as "one of the major purposes." Accordingly, the Court properly defined those disabilities that will excuse the employer from full liability in such a way as to remove the incentive that would otherwise be present for employer

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[3]The economic disability standard derives from the definition of "disability" in Section 2(10) of the LHWCA, 33 U.S.C. 902(10), which states: " 'Disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." The courts, however, have not applied the economic disability concept to Section 8(f) pre-existing disabilities; rather, they have held that "[s]uch a construction defeats the very purpose of new §8(f) by leaving many workers with physical disabilities without the protection intended by Congress." *C & P Telephone Co.* v. *Director, OWCP,* 564 F.2d 503, 512 (D.C. Cir. 1977). See, *e.g., General Dynamics Corp.* v. *Director, OWCP,* 673 F.2d 23, 26 (1st Cir. 1982); *Director, OWCP* v. *Universal Terminal & Stevedoring Corp.,* 575 F.2d 452, 455 (3d Cir. 1978); *Equitable Equipment Co.* v. *Hardy,* 558 F.2d 1192, 1196-1198 (5th Cir. 1977).

[4]Although it disagreed with the legal standard used by the administrative law judge, the court of appeals nevertheless agreed with his ultimate determination that Lostaunau did not have a pre-existing disability. Under either standard the administrative law judge's findings of fact established the absence of a pre-existing disability (Pet. App. 9d-10d).

discrimination in the hiring and retaining of employees with pre-existing disabilities. *Id.* at 201-204. See *C & P Telephone Co.* v. *Director, OWCP, supra,* 564 F.2d at 512.

Petitioners also object to the requirement that the pre-existing disability be "manifest to the employer" (Pet. 24-25). This widely accepted requirement,[5] however, effectuates the anti-discriminatory purposes underlying Section 8(f) and identified in *Lawson.* Clearly, "if the previous disability had not been manifest, the employer would have had no reason to discriminate against the handicapped person in hiring or firing." *C & P Telephone Co.* v. *Director, OWCP, supra,* 564 F.2d at 514 n.10.[6] Any previous condition that was not "manifest" — *i.e.*, of which knowledge was not available to the employer "should he decide to take notice of it" —cannot be considered an "existing permanent partial disability," *Dillingham Corp.* v. *Massey,* 505 F.2d 1126, 1128 (9th Cir. 1974).

2. Petitioners also contend (Pet. 25-26) that the court of appeals usurped the factfinding function of the administrative law judge by determining that Lostaunau did not suffer from a pre-existing disability. This contention is erroneous. The court merely applied the appropriate definition of permanent partial disability to the administrative law judge's findings of fact (Pet. App. 9d-11d). In so doing, the court

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[5]See, *e.g.*, *Ridgley* v. *Ceres, Inc.*, 594 F.2d 1175, 1178 (8th Cir. 1979); *Atlantic & Gulf Stevedores, Inc.* v. *Director, OWCP,* 542 F.2d 602, 609 (3d Cir. 1976); *Dillingham Corp.* v. *Massey,* 505 F.2d 1126, 1128 (9th Cir. 1974).

[6]Petitioners also suggest (Pet. 21) that the court below inappropriately imposed additional, more stringent requirements. The petition cites a number of factual findings from the opinions of the administrative law judge and the court of appeals in support of this contention (*ibid.*). The cited findings, however, were offered by both the administrative law judge and the court as facts supporting their conclusions and not as legal prerequisities.

preserved the well-established inter-relationship between the administrative law judge, the Benefits Review Board, and the court of appeals: neither the Board nor the court may overturn the administrative law judge's findings of fact unless the findings are not supported by substantial evidence or are irrational. See, *e.g.*, Section 21(b)(3) of the LHWCA, 33 U.S.C. 921(b)(3); *O'Keeffe* v. *Smith Associates*, 380 U.S. 359, 362 (1965); *Bumble Bee Seafoods* v. *Director, OWCP*, 629 F.2d 1327, 1329 (9th Cir. 1980); *Avondale Shipyards, Inc.* v. *Vinson*, 623 F.2d 1117, 1119 n.1 (5th Cir. 1980). Because the court of appeals based its legal conclusion that Lostaunau did not suffer from a pre-existing disability on findings supported by substantial evidence, further review by this Court is unwarranted. Moreover, this Court has noted that it will only rarely review a decision by a court of appeals that an agency decision is supported by substantial evidence and will do so only if the standard has been "misapprehended or grossly misapplied." *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).[7]

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[7]Petitioners make a number of additional general assertions concerning errors in the court's and the administrative law judge's handling of the facts (Pet. ii, 25-26), but fail to specify the purported errors.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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